No. 79-600

In the Supreme Court of the United States

OCTOBER TERM, 1979

CARLOS SARMIENTO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 604 F. 2d 304.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1979. A petition for rehearing (Pet. App. 17a-18a) was denied on September 11, 1979. The petition for a writ of certiorari was filed on October 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court improperly restricted the cross-examination of a prosecution witness.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of North Carolina, petitioners were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 952(a), 960(a)(1), 963, 841(a)(1), and 846. They were sentenced to terms of imprisonment ranging from two to five years, and petitioners Neill and Sarmiento were each fined $5,000.[1] The court of appeals affirmed (Pet. App. 1a-16a).

The evidence at trial showed that in the spring of 1977 Wade Bailey, a fishing boat captain, was contacted by a United States Customs agent who informed him that the Customs Service was authorized to pay rewards for information leading to the seizure of ships engaged in smuggling drugs into the United States. At about the same time, Bailey was approached by two of petitioners' co-defendants,[2] who wanted to use his boat to smuggle marijuana into North Carolina from an off-shore ship (Tr. 334-336). Bailey related his conversation with them to the customs agents and began to work undercover for the United States (Tr. 339).[3]

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[1]Petitioners Neill and Sarmiento received five-year prison terms, to be followed by special parole terms of five years for Neill and two years for Sarmiento. Petitioner Alexander was sentenced to a three year term, with a special parole term of two years. Petitioners Estevez and Dominguez were sentenced under the Youth Federal Corrections Act.

[2]Eighteen defendants were brought to trial in this case. Eight were acquitted and five did not appeal.

[3]Bailey also was approached by a second group attempting to smuggle marijuana (Tr. 445). His undercover work in that case led to the seizure of both a substantial amount of marijuana and the DON ELIAS, the mothership in the smuggling operation (Tr. 445-447). The seizure in that case occurred in December 1977, approximately two weeks after petitioners' arrests (Pet. App. 21a).

After months of planning, Bailey met on November 16, 1977, with several of the co-conspirators, including at least three of the petitioners, to iron out last-minute details of the smuggling plan and to obtain a payment of front money (Tr. 378, 556-557). That afternoon he set out to sea with two of the defendants to rendezvous with a mothership, the SEA CRUST, at a prearranged point about 40 miles off the coast of North Carolina (Pet. App. 3a-4a). After failing to make contact, Bailey's boat returned to shore. The smugglers then became suspicious that the boat was under government surveillance and began scouting about for a substitute (Pet. App. 4a). Upon learning of this change in plans, the Customs Service prevailed upon the Coast Guard to dispatch a cutter to the rendezvous location. Utilizing prearranged radio frequencies and code words supplied by Bailey, the cutter managed to locate the SEA CRUST (*ibid.*). A chase ensued, and eventually the ship was stopped and boarded more than 200 miles off-shore (Pet. App. 5a).

Petitioners here include the captain of the SEA CRUST, three men whose presence at the November 16 meeting is undisputed, and a fifth person whose involvement in the conspiracy included the purchase of a small boat to be used in ferrying marijuana from Bailey's boat to the shore and the rental of a truck to be used to transport the marijuana once it reached the shore.

ARGUMENT

On cross-examination, petitioners attempted to question Bailey about whether he had, without authorization, diverted several bales of marijuana while working as an informant in the unrelated DON ELIAS case (Tr. 446, 454, 462). On each occasion, the trial court sustained government objections. Petitioners contend that the district court erred in these rulings. They argue that

Bailey had subjected himself to the possibility of prosecution for that activity, and that inquiry into his actions was thus proper impeachment to show that he had a motive to testify favorably to the government (Pet. 5-6). Viewed in its proper factual context, this contention lacks merit. Moreover, the petition presents no reason why review by this Court is warranted.

It is true that a trial court may not cut off meaningful cross-examination as to a principal witness's partiality and motive for testifying. *Davis* v. *Alaska*, 415 U.S. 308 (1974). However, it is equally true that the trial judge retains broad discretion over the scope of permissible impeachment. Rule 403, Fed. R. Evid.; *Alford* v. *United States*, 282 U.S. 687, 694 (1931). Once cross-examination sufficient to satisfy the Sixth Amendment's Confrontation Clause has been permitted, the district court may limit further attempts at impeachment that are of questionable relevancy or that are cumulative or vexatious. See, *e.g.*, *United States* v. *Summers*, 598 F. 2d 450, 460 (5th Cir. 1979); *United States* v. *Fitzgerald*, 579 F. 2d 1014 (7th Cir. 1978).

The court of appeals applied these standards to the facts of this case and concluded properly that cross-examination was not impermissibly restricted here. As the court of appeals noted (Pet. App. 13a), the district court allowed extensive impeachment of Bailey's credibility in general and his motives for testifying in particular. Under cross-examination, Bailey admitted that in exchange for his activities as an informant he expected to receive a reward from the government equal to 25% of the value of all confiscated property, that he expected the reward to be substantial, and that his "primary motivation throughout these things has been money" (Tr. 444-445). And although Bailey testified that his reward was conditioned on the seizure of property rather than the outcome of the trial (Tr. 463), as

petitioner Alexander's counsel observed during his summation (Tr. 1511), the validity of the seizure of the SEA CRUST outside the territorial limits of the United States might well have depended on proof at trial of a connection between the ship and a conspiracy to smuggle its contents into this country. Petitioners and their co-defendants also established on cross-examination that Bailey had a prior conviction (Tr. 447, 463); that he had turned in two boyhood friends (Tr. 451); that he might have been willing to smuggle a load of marijuana if he had not been contacted by the Customs Service (Tr. 466); and that he had been given $43,000 by petitioners during the conspiracy, which the government had allowed him to keep (Tr. 445, 452, 456, 475; Pet. App. 13a).

In the midst of this sweeping assault on Bailey's credibility, petitioners sought to question him about the DON ELIAS matter. Counsel's questions suggested that Bailey's skimming of marijuana from that ship evidenced his willingness to do anything for money and his general bad character (Tr. 446, 462). The trial judge therefore properly acted within his discretion in cutting off what appeared to be irrelevant or at best cumulative cross-examination. Petitioners argue here, as they did in the court of appeals, that the prohibited line of questioning did not constitute merely an attack on Bailey's general credibility; rather, they now suggest that it would have afforded the jury a basis for inferring that Bailey had a "specific motive * * * to falsify his testimony" (Pet. 5). Whatever the merits of this contention, it is an afterthought, brought up long after the cross-examination of Bailey had ended. Petitioners made no such argument to the trial judge in response to the government's objections. They should not now be heard to ask for reversal on a ground not called to the attention of the district court at the time it ruled on the prosecution's objections to this line of cross-examination.

The court of appeals, on the other hand, was presented with and did consider petitioners' contention. In so doing, the court was not unmindful of the constitutional considerations involved. Nevertheless, after reviewing the record it concluded that the "exclusion of testimony about Bailey's illegal double-dealing in other smuggling was within the bounds of the court's permissible discretion" (Pet. App. 13a). Contrary to petitioners' suggestion (Pet. 8), the court's conclusion does not constitute a refusal to apply the mandate of *Davis* v. *Alaska*, *supra*. Rather, it constitutes an application of the principles enunciated therein to the particular facts of this case. The court of appeals took specific note of the fact that "the district court did not limit cross-examination of Bailey concerning his actions and motives with respect to the smuggling conspiracy for which the appellants were being tried" (Pet. App. 13a). The court also noted that "comprehensive impeachment evidence" was in fact adduced (*ibid.*).

Although it did not take issue with petitioners' characterization of Bailey as "the prosecution's principal witness" (Pet. App. 12a), the court below recognized that the government's case did not stand or fall on Bailey's credibility. Thus, in disposing of petitioner Dominguez' claim that his participation in the conspiracy had not been established, the court did not even mention Bailey's testimony. Rather, it relied on physical evidence linking petitioner to the conspiracy. Dominguez, together with petitioners Estevez and Sarmiento, "was arrested at what appears to have been the headquarters of the smuggling operation. There the government agents seized a radio frequency sweeper (a 'bug detector'), a list of radio frequencies matching the frequencies on the single sideband on the *Sea Crust*, a VHF walkie talkie which

matched a walkie talkie found on the *Sea Crust*, and a scanner device which monitored police broadcasts" (Pet. App. 12a; see also Tr. 1031-1056, 1071-1077).[4]

Petitioners have presented no reasons why further review is warranted. In essence they ask this Court to second-guess the court of appeals' application of settled principles to a particular fact situation. However, it is well settled that this Court does not sit as a court for correction of errors—especially errors not called to the attention of the trial court. Nothing in the record of this case suggests that an exception to that practice should be made here.[5]

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[4]There also was substantial physical evidence tying petitioner Alexander to the conspiracy on-shore (see Trial Exhibits 34, 36, 37, 39, 40 and 41; see also Tr. 729-737, 778-779, 821-825, 888-889, 896-901). As for petitioner Neill, his admitted purchase of the small boat and rental of the truck, physical evidence tying the truck to the landing area where Bailey's boat was to come ashore, and a drawing showing Bailey's boat flanked by an outrigger boat with Neill's nickname next to it (Trial Exhibits 21, 26-30, 80; Tr. 1000-1002, 1011-1013, 1435), suffice to prove his participation without regard to Bailey's testimony.

[5]Petitioners' second contention is that the decision of the circuit courts conflict as to whether a violation of *Davis* v. *Alaska* can ever be harmless error. However, since the court of appeals found that the district court's exclusion of testimony did not constitute a violation of the Confrontation Clause, the harmless error question is not presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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